Filed 5/31/19 P. v. Werly CA3

NOT TO BE PUBLISHED



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Yolo)

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| THE PEOPLE,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>RICHARD HENRY WERLY, JR.,<br><br>Defendant and Appellant. | C084764<br><br>(Super. Ct. Nos. CRF167622, CRF163445) |

Defendant Richard Henry Werly, Jr., physically attacked a man in an alley and demanded his money, wallet, and truck. A jury found defendant guilty of attempted robbery, assault by means of force likely to produce great bodily injury, and making criminal threats. On appeal, defendant contends insufficient evidence supported his attempted robbery conviction and the trial court committed instructional error by not instructing the jury on the lesser included offense of attempted theft. We direct correction of a clerical error in the abstract of judgment and affirm.

## FACTUAL AND PROCEDURAL BACKGROUND

On December 21, 2016, defendant angrily approached Brent M. in an alley. Brent had driven his truck and trailer down the alley to remove a tree he was hired to remove. Defendant repeatedly demanded to see Brent's "Indian papers." Brent replied he did not have any "Indian papers," but defendant continued to walk towards Brent, demanding to see the papers.

Defendant then punched Brent in the face approximately five times. Defendant was blocking Brent's path, and Brent tried to defend himself. Brent felt he was in "a life or death situation." Defendant knocked Brent to the ground, and the men continued to fight on the ground. While Brent remained on the ground, defendant got up and kicked Brent in the head. Brent yelled, "Call 911" loud enough to seek help from anyone in the vicinity.

At some point defendant demanded Brent's truck and wallet, and he threatened to "dig a hole and bury [Brent] in it." Brent did not recall precisely when defendant demanded his truck and his wallet, but it was before he got back in his truck. Brent remembered defendant threatening to dig a hole and bury him in it while he was still on the ground. Other than asking for "Indian papers," Brent took defendant's words seriously. Defendant did not take any property from Brent, did not reach inside Brent's pockets, did not try to grab Brent's keys, and did not try to grab Brent's wallet. Brent's testimony was consistent with contemporaneous statements he gave to responding officers.

A surveillance camera captured the assault. Brent claimed he was afraid "the whole time of the [surveillance] video," and his fear only subsided when the police came.

A jury found defendant guilty of attempted robbery (Pen. Code, §§ 21a, 211, 212.5, subd. (c), 213, subd. (b); count 1),[1] assault by means of force likely to produce great bodily injury (§ 245, subd. (a)(4); count 2), and criminal threats (§ 422; count 3). The trial court sentenced defendant to the upper term of four years in prison on count 2 and three year terms on each of counts 1 and 3, stayed pursuant to section 654. The court also sentenced defendant on a violation of probation to one year, consecutive, for a total of five years in prison. The court struck defendant's three prison priors.

## DISCUSSION

### I

### *Insufficiency of the Evidence*

Defendant contends insufficient evidence supported his conviction for attempted robbery. He argues Brent's testimony was unclear as to when defendant demanded Brent's money, wallet, and truck, and therefore there was insufficient evidence to prove he intended to rob Brent before he applied force or fear. We disagree.

"In determining the sufficiency of the evidence to support a conviction, 'the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.' [Citation.]" (*People v. Leon* (2008) 161 Cal.App.4th 149, 156.) Judicial review of a claim of insufficient evidence includes review of "the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence -- that is, evidence which is reasonable, credible, and of solid value-such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*People v. Johnson* (1980) 26 Cal.3d 557, 578.)

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[1] Further undesignated statutory references are to the Penal Code.

"Robbery is 'the taking of personal property of some value, however slight, from a person or the person's immediate presence by means of force or fear, with the intent to permanently deprive the person of the property.' [Citation.]" (*People v. Jackson* (2016) 1 Cal.5th 269, 343.) "A conviction of robbery requires evidence showing that the defendant conceived the intent to steal either before or during the commission of the act of force against the victim. [Citation.]" (*Ibid.*) " ' "[I]f the intent arose only after the use of force against the victim, the taking will at most constitute a theft." ' [Citation.]" (*Ibid.*) "An attempted robbery requires a specific intent to commit robbery and a direct, ineffectual act (beyond mere preparation) toward its commission. [Citations.]" (*People v. Medina* (2007) 41 Cal.4th 685, 694.)

There is substantial evidence defendant formed the intent to rob Brent while applying force or fear. Defendant punched Brent in the face approximately five times and blocked Brent's ability to escape. Defendant knocked Brent to the ground and kicked him repeatedly in the head. While Brent was on the ground, defendant threatened to bury him. Brent was (quite reasonably) afraid of defendant until the police came.

Although the timing of defendant's demands for Brent's truck and wallet is not exactly clear, Brent testified defendant demanded his truck and his wallet while Brent was still outside of the truck and while the threats were ongoing. He remembered defendant first demanded his wallet and threatened him while he was still on the ground. Brent told a police officer immediately after the incident that defendant first demanded his wallet and threatened him while he was still on the ground. Brent also told the police officer defendant demanded "all [his] money" before he got back in his truck. Viewing the evidence in the light most favorable to the prosecution, defendant's vicious, unprovoked attack on Brent caused Brent to reasonably fear for his safety until the police arrived, and defendant demanded Brent's money, wallet, and truck while Brent remained reasonably afraid of defendant. Therefore, there is substantial evidence defendant formed

the intent to commit robbery while applying force or fear to Brent. Sufficient evidence supports the conviction.

II

*Instructional Error*

Defendant contends the trial court erred by failing to instruct the jury on attempted theft. He argues the court had a duty to instruct sua sponte on the lesser included offense of attempted theft because the evidence would have justified finding defendant not guilty of attempted robbery but guilty of attempted theft. Again, we disagree.

"The court must instruct on a lesser included offense, even if not requested to do so, 'when the evidence raises a question as to whether all of the elements of the charged offense are present and there is evidence that would justify a conviction of such a lesser offense.' [Citations.]" (*People v. Melton* (1988) 44 Cal.3d 713, 746.) But a trial court is only required to instruct on a lesser included offense where there is substantial evidence that, if believed, absolves the defendant's guilt on the greater offense, but not on the lesser. (*People v. Waidla* (2000) 22 Cal.4th 690, 733.) Substantial evidence exists where " 'a reasonable jury could find [it] persuasive.' " (*People v. Millbrook* (2014) 222 Cal.App.4th 1122, 1137.) In addressing whether substantial evidence exists of a lesser included offense, trial courts " 'should not evaluate the credibility of witnesses, a task for the jury.' " (*Ibid*.) "Any doubts about the sufficiency of the evidence to warrant a requested instruction should be resolved in favor of the defendant." (*People v. Glenn* (1991) 229 Cal.App.3d 1461, 1465, abrogated on other grounds by *People v. Blakeley* (2000) 23 Cal.4th 82.) Whether a trial court improperly failed to instruct on a lesser included offense is reviewed de novo. (*Waidla*, at p. 733.)

"Theft is a lesser included offense of robbery, which includes the additional element of force or fear." (*People v. Webster* (1991) 54 Cal.3d 411, 443.) The trial court would only be required to instruct the jury on attempted theft if there were substantial evidence defendant attempted to permanently deprive Brent of his personal property

*without* the use of force or fear. Defendant contends the jury could have found defendant only demanded Brent's truck and wallet after defendant's physical assault on Brent had ceased. But the evidence does not support a finding that defendant attempted to steal Brent's property without first employing force or fear. There was no evidence defendant attempted to surreptitiously steal Brent's property out of Brent's presence or otherwise deprive him of his property without using force or fear. Given the evidence adduced at trial, defendant was either guilty of trying to steal from Brent through force and fear or not guilty of trying to steal from Brent at all. Because there is no substantial evidence that defendant committed attempted theft but not attempted robbery, the trial court did not err in failing to instruct the jury on attempted theft as a lesser included crime of attempted robbery.

III

*Clerical Error in the Abstract of Judgment*

It has come to our attention that the abstract of judgment needs correction.[2] "Rendition of the judgment is normally an oral pronouncement, and the abstract of judgment cannot add to, or modify, the judgment, but only purports to digest and summarize it. [Citation.]" (*People v. Zackery* (2007) 147 Cal.App.4th 380, 389.) "Where there is a discrepancy between the oral pronouncement of judgment and the minute order or the abstract of judgment, the oral pronouncement controls. [Citations.]" (*Id.* at p. 385.)

The trial court sentenced defendant to three years on each of counts 1 and 3, stayed pursuant to section 654. But neither the clerk's minutes of the sentencing hearing nor the abstract of judgment accurately reflect the sentences as stayed rather than

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[2] In the interests of judicial economy, we have proceeded in the absence of supplemental briefing. Any aggrieved party may invoke the remedy provided by Government Code section 68081.

concurrent. Accordingly, we direct the trial court to correct the abstract of judgment to check (and uncheck) the appropriate boxes for the stayed counts. (*People v. Rowland* (1988) 206 Cal.App.3d 119, 123 [appellate court has authority to correct such clerical errors].) We also suggest correction of the court's internal records to accurately reflect the sentences as pronounced.

**DISPOSITION**

The judgment is affirmed. The trial court is directed to prepare a corrected abstract of judgment to reflect that the sentences for counts 1 and 3 were stayed pursuant to section 654 and forward a certified copy of the corrected abstract to the Department of Corrections and Rehabilitation.

/s/
Duarte, J.

We concur:

/s/
Butz, Acting P. J.

/s/
Renner, J.